

In The  
**UNITED STATES CIRCUIT COURT OF APPEALS**

For the Ninth Circuit

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CENTRAL CALIFORNIA CANNERIES COMPANY, GRIF-  
FIN & SKELLEY COMPANY, J. C. AINSLEY  
PACKING COMPANY, ANDERSON-BARNGROVER  
MANUFACTURING COMPANY, GOLDEN GATE  
PACKING COMPANY, J. F. PYLE & SON, INC.,  
HUNT BROTHERS COMPANY, SUNLIT FRUIT  
COMPANY,

Appellants,

v,

DUNKLEY COMPANY (now known as Michigan Canning  
& Machinery Company) and DUNKLEY COMPANY,  
Appellees.

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**BRIEF FOR DUNKLEY COMPANY, ET AL., OPPOSING  
MOTION AND PETITION FOR LEAVE TO FILE  
AN ORIGINAL BILL IN THE NATURE OF A BILL  
OF REVIEW.**

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**FILED**

APR 26 1922

F. D. MORGENTHAU  
CLERK

FRED L. CHAPPELL,  
Kalamazoo, Michigan.

W. A. RICHARDSON,  
San Francisco, Calif.

Counsel for Plaintiff-Appellee.



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*In the United States Circuit Court of Appeals  
for the Ninth Circuit.*

No. 3824.

CENTRAL CALIFORNIA CANNERIES COMPANY,  
Appellant,  
GRIFFIN & SKELLEY COMPANY,  
Appellant,  
J. C. AINSLEY PACKING COMPANY,  
Appellant,  
ANDERSON - BARNGROVER MANUFACTURING  
COMPANY,  
Appellant,  
GOLDEN GATE PACKING COMPANY,  
Appellant,  
J. F. PYLE & SON, INC.,  
Appellant,  
HUNT BROTHERS COMPANY,  
Appellant,  
SUNLIT FRUIT COMPANY,  
Appellant,

v.

DUNKLEY COMPANY (now known as Michigan Can-  
ning & Machinery Company) and DUNKLEY COM-  
PANY,

Appellees.

**BRIEF FOR DUNKLEY COMPANY, ET AL., OPPOS-  
ING MOTION AND PETITION FOR LEAVE TO  
FILE AN ORIGINAL BILL IN THE NATURE OF  
A BILL OF REVIEW.**

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This notice was served for a hearing about the 6th  
of February, 1922, and it has been continued to the

present time because of engagement of counsel for appellants in the Supreme Court of United States.

The motion was sworn to (p. 55 of printed petition) on the 5th day of January, 1922, and its receipt was acknowledged by counsel for appellees on January 6th, 1922.

We will consider this matter as to defendants' right to present this petition at this time, and also the merits which have already been passed upon by the court below, this motion amounting to a request to that court to consider again matter already fully reviewed on the merits.

First: No diligence has been manifested on the part of appellants, three years substantially having elapsed since they were in possession of this information.

Second: The same matter has already been submitted to the court below on the motion for a request of that court to this court to recall its mandate and permit the case to be reopened, and the relief sought had been denied, the merits being incidentally considered and an appeal being denied.

Third: This court has already passed upon the matter and had at the time of the issue of its mandate. Therefore such mandate ought not and could not properly be recalled, as pointed out by the court below, speaking by Judge Van Fleet.

Fourth: The court below, speaking by Judge Van Fleet, as a further reason for refusing to request this court to recall its mandate, considered the entire matter

on its merits at great length, and declined particularly to consider the matter because there was no merit in petitioners' case, no showing having been made that should in any way modify the original decision herein, there being no proof whatsoever of the quality and character called for by a long line of decisions of the Supreme Court and of this court as necessary to anticipate a patent on a meritorious invention. See:

*Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 158.

*Diamond Patent Co. v. S. E. Carr*, 217 Fed. 400 (C. C. A. 9th).

*Symington v. National Malleable*, 250 U. S. 383, 386.

*Deering v. Winona Harvester Works*, 155 U. S. 286, 300.

to the latter two cases of which Judge Van Fleet took particular pains to refer in his consideration of the merits.

Fifth: We will then consider the merits of all matter herein presented, and point out wherein the petition and showing is not of such quality and character as to warrant its consideration in the anticipation of a patent on a meritorious invention. The showing fails completely to comply with the showing above required.

Sixth: The Dunkley patent has not only the prestige of an issued and adjudicated document, but is supported by the undisputed testimony of a large number of unimpeachable witnesses whose testimony is confirmed and supported by all the pertinent documentary proofs in this case.



**First—No diligence has been manifested on the part of defendants.**

We emphasize that no diligence has been manifested on the part of the appellants herein. Newly discovered evidence is referred to at page 19 of the printed petition, and it is pointed out that it was developed in the trial at Los Angeles which began May 21, 1918, and continued until July 2, 1918, about three and one-half years before the execution of the petition herein. This is pointed out under items lettered (a), (b), (c) and (d) at pages 19 to 31 of the printed petition.

There is no explanation of the want of diligence in bringing that matter to the attention of this court.

The items appearing in paragraph (e), petition page 31, were developed in the trial of the case in New York, showing the production of the Dunkley pay rolls. No date is vouchsafed in that paragraph, but the New York trial occurred in October, 1918. The pay rolls referred to were therefore in the possession of appellants for more than three years.

Paragraph (f), petition page 32, points out new matter discovered in an article in the "Weekly Tribune-Messenger" of April 22, 1904. The diligence (?) particularly as to that paragraph is pointed out at page 37 of the petition, where it appears that this was discovered and made known to Kemper B. Campbell (who swore to these petitions on January 5th, 1922) on January 18, 1919, nearly three years before the date of execution of the petitions herein.



As to the matter appearing in paragraph (g), petition page 34, it is pointed out so far as Arthur W. Norton is concerned that the said Kemper B. Campbell called on him about the month of February, 1918, and that in November, 1918, at Baltimore, Maryland, the attention of said Norton was called by Francis J. Heney to certain correspondence and that

“as a result thereof the sequence of events occurring at South Haven had become clear to him (Norton) and that he was then able and willing to testify to certain facts which were subsequently, to-wit, on December 6, 1918” (more than three years before the date of the petition herein) “and February 10, 1919” (nearly three years before) “expressed in the affidavits referred to in subdivision (g) of paragraph IV hereof” (printed petition, page 39).

The lapse of three years is unexplained. This is not such diligence as would warrant the consideration of a petition to file an original bill in the nature of a bill of review. No item appears herein which is presented as new matter which is recently discovered, the most recent having been known to petitioners nearly three years.

**Second**—The matter here submitted has already been decided by the court below on special application in the instant cause. The order being interlocutory is not appealable.

This whole matter, each and every item of it, has been passed upon in the instant cause, having been presented to the District Court in motion of defendants and application for a request to the Circuit Court of Appeals to recall its mandate and for a rehearing, which motion was noticed for November 11, 1918 (page 10 of Record No. 3824). The whole matter has been considered by Judge Van Fleet of that court on its merits, as well as on the question of diligence and a matter of right. It was not appealable matter and the petition for appeal was not allowed.

Judge Van Fleet has said in effect that he considered that the defendants were foreclosed in making its application at that time, saying at page 282 of Record 3824:

“It appears that defendants first presented a motion to accomplish the same purpose and upon the same showing to the Circuit Court of Appeals in these cases, after its denial of a rehearing but before the remittitur had been sent down; but that court” (meaning this Circuit Court of Appeals) “peremptorily denied the defendants’ motion, without opinion, and by an order which is wholly silent as to defendants having leave to apply to this court for such relief.”

Judge Van Fleet then stated:

“This action is now made the basis of an objection by the plaintiff that the defendants are pre-

cluded from renewing the present motion here and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked."

Judge Van Fleet then explained that he

"was disposed at the argument to regard the objection rather lightly but a more mature consideration of the authorities discloses that the question is not free from doubt."

He then explains (bottom of page 284 of Record 3824):

"But however the objection should be decided, is, in the view I take of the merits, of little moment in the present case."

Explaining:

"I say this for the reason that, after a very careful *review of the voluminous record*, I find myself able to take no more favorable view of this application than that indicated by the court of appeals."

Judge Van Fleet thereupon considered the entire merits and there was also a complete review of each and every item here presented, the same appearing in the printed appeal record herein. Judge Van Fleet stated his opinion fully and clearly thereon, his opinion extending from page 279 to page 297 of Record 3824.

It thus appears that every matter that defendants now seek to present by their original bill in the nature of a bill of review, has already been presented to the court below and been considered on its merits; and not

being an appealable matter no appeal has been allowed thereon. Such matter as there presented is not proper to be appealed from in an interlocutory decree. If there is anything to review, it should come, and can properly come, on an appeal to review the final decree in the case when the same is entered. See:

*National Brake & Electric Co. v. Christiansen,*  
254 U. S. 425.

We believe, however, that the whole matter has been concluded and decided, and that it would not receive consideration if brought to the attention of the court on an appeal from a final decree.

**Third—This court has already passed upon the matter and it is proper to be considered as having been adjudicated.**

Aside from the fact that the merits of this matter have already been considered by the District Court and are the subject matter of the petition for appeal refused herein, this court has already passed upon the substance of this matter, and had considered the same at the time of the issuing of its mandate.

Consequently the defendants are in the position of now asking the court to grant permission to file an original bill in the nature of a bill of review on matter which they had submitted to this court before the issuing of its mandate.

This was submitted in the notice of “motion for orders vacating decree affirming decrees of the District

Court, etc.," filed May 1, 1918, the same having been argued by counsel on May 6, 1918, and decided May 20, 1918.

This is referred to by Judge Van Fleet in his decision in the appeal record No. 3824, where at page 282 he says:

"This action is now made the basis of an objection by plaintiff that the defendants are precluded from renewing the present motion here, and that this court is concluded by the ruling of the Circuit Court of Appeals from granting the relief asked."

This is certainly true, under the decision of *National Brake & Electric Co. v. Christiansen, supra*. The request having been made before the issuing of the mandate and the questions having been raised, they are not subject now to review, having already been passed upon by this court.

Defendants had their day in court.

Fourth—The merits of the matter presented have been considered by the court below and the relief denied and there is no merit in the matter here presented, and nothing that would warrant the invalidating of an issued patent, there being a showing only of oral testimony as to matters long past, unsupported by any pertinent documents.

*Barbed Wire Patent*, 143 U. S. 275, 36 L. Ed. 158.

*Diamond Patent Co. v. Carr*, 217 Fed. 400 (C. A. 9th).

*Symington v. National Malleable*, 250 U. S. 383, 386.

*Deering v. Winona Harvester Works*, 155 U. S. 286, 300.

In the appeal record No. 3824 Judge Van Fleet at page 279 explains his reason for considering the merits of this matter. Considering the claimed adjudication, he says at page 284:

“But however the objection should be decided” (that is, the objection as to adjudication) “is, in the view I take of the merits, of little moment in the present case. I say this for the reason that, after a very careful review of the voluminous record, I find myself able to take no more favorable view of this application than that indicated by the court of appeals; and there can be no transgression or disparagement of the ruling of the latter court by looking into the record for the purpose of stating my reasons for that conclusion.”

He then considered the Dunkley patent, the manner in



which it has been upheld by the Court of Appeals of the District of Columbia, and then comes to a consideration of matters pertinent in the case of *Dunkley v. Pasadena* and *Dunkley v. California Packing Corporation*, presented for the first time before Judge Trippett in the former case and later to Judge Hand in the latter case. He says at record page 287:

“I have had the benefit of the views and comments found in the opinions of both my learned brothers, which led them to an opposite conclusion with myself as to the validity of the patent, yet nevertheless I am constrained to say, that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the new evidence nor with the conclusions reached in those cases.”

He then refers to the character of the testimony, saying:

“That there was a cloud of ‘new’ witnesses it is quite true giving indication that the country had been raked with a fine-toothed comb so to speak; but there was little new evidence given by them—if the term be used to express the idea of material evidence. In fact, there is none aside from one or two items of so-called documentary proof which does not fall strictly within the characterization of the Supreme Court as being wholly insufficient in character as a basis to set aside or defeat an existing patent.

In the very recent case of *Symington v. National Malleable Castings Co., et al.*, 250 U. S. 383, 386, that court took occasion to say: ‘This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings or kindred evidence, open to grave suspicion; par-



ticularly if the testimony be taken after the lapse of years from the time of the alleged invention. *Deering v. Winona Harvester Works*, 155 U. S. 286, 300'."

Judge Van Fleet then commented:

"There is a striking *absence of anything in the nature of models, drawings or memoranda produced to support the mere oral statement* of these witnesses made in nearly every instance purely from memory, and this after a lapse of from fifteen to eighteen years; and as to the items of book entry and correspondence they were not only wholly inconclusive in their character but made as strongly in support of the plaintiff's theory as to the date the invention was put in practice as that of the defendants. Indeed I regard the item referred to as the '*Norton letters*,' to which much significance is attached, as making, in their sequence, when properly construed, *entirely in favor of the plaintiff*.'"

He then discusses the decisions of Judge Trippett and Judge Hand, showing that they have not relied upon the documentary testimony at all in reaching their conclusions adverse to his own, but had been misled into considering things unquestionably recent as though they were prior art. He points out the consideration given by the Court of Appeals in its opinion to the witness Stewart Campbell, quoting the language of this court (R. pp. 290-291), and saying further (p. 291):

"Campbell's testimony was not materially different before Judge Trippett but the latter does not advert to the aspect above discussed by the Circuit Court of Appeals, merely closing his consideration of the witness' evidence by saying:

‘There is no reason in any event for discrediting Campbell.’ ”

He explains the error of Judge Trippett and Judge Hand and points out that the Baker-Chalker orange washer device was before him, and that the model identified by Judge Hand was “*adapted from memory by Baker*” (p. 293). He points out (p. 294) his previous specific consideration of the Baker-Chalker device and that the same had been considered by this Court on appeal in affirming his views.

There is in this record No. 3824, beginning at page 10 with the motion and at p. 16 with the affidavits, the matter which was submitted to Judge Van Fleet. We consider the same briefly:

*Augensen* (R. pp. 19-22), and supplemental affidavit (R. pp. 24-5), identifies no pertinent documents. He shows a photograph of a brush machine which he said was installed in the spring of 1904. He *was not* at the Dunkley plant in the year 1903.

*Brazil* (R. pp. 27-28), oral testimony merely about some accounts that might or might not have been pertinent.

*Katherine Breen* (R. p. 31), oral testimony about accounts having no relation to the subject in hand.

*George K. Brown* (R. pp. 34-37), oral testimony, with nothing produced that is pertinent to the subject in hand. Supplemental affidavit to the same effect at (R. p. 39).

*Mrs. George K. Brown* (R. pp. 43-45), same as her husband.

*Fred J. Buckley* (R. pp. 47-48), merely oral testimony, with nothing pertinent in the way of documentary proofs.

*Kemper B. Campbell* (R. pp. 50-74), one of the counsel for defendant in the case, states hearsay matters in connection with his "investigations." It shows great delay and no explanation of it. Nothing pertinent to the case because he has only *hearsay* knowledge.

*Stewart Campbell* (R. pp. 76-81) gave oral testimony in the main case, and adds nothing in the least pertinent here.

*Robert H. Clark* (R. pp. 83-84), oral testimony. He was a bookkeeper and produced some accounts of the Clark Engine & Boiler Company, but no documentary evidence that is pertinent.

*Lyman L. Crosthwaite* (R. pp. 87-89), identifies the article, "The canning factory is a busy place," of October 1, 1903. He has no knowledge and it does not appear why he should have had, as to new developments not desired to go to the public. Supplemental affidavit at R. pp. 89-91 was subscribed to on the 11th of February, 1919, in which he identifies the article in the Tribune-Messenger of April 19, 1904, reprinted in the edition of April 22, 1904, relating to installation of *two pitting* machines and *two paring* machines at the Dunkley canning factory. He refers to an article in the issue of June 17, 1904, as to his connection with the papers.

This document is of importance because it supports the plaintiff's position and will be referred to hereafter in that behalf. It is not a document that supports the contentions of defendants, that there was no machine installed in the year 1903. It would be quite remarkable that two entirely new lines should be installed in the Dunkley factory without a previous test. The document also points out the construction of a peeling table 110 feet long at that time, which shows how utterly Judge Trippett was misled when he said that the presence of a long table in the large canning factory of the Dunkley Company in 1903 was wholly inconsistent with the presence of the Dunkley peach peeling machine.

*Martin DeLoof* (R. pp. 93-95), gave only oral testimony. The pay rolls he refers to speak for themselves. They do not give any indication as to peach peeling. They do show certain important facts as to the untruthfulness of many of defendants' witnesses, who, however, were testifying orally.

*Charles DePue* (R. p. 98), gave oral testimony as to mere recollection.

*Mrs. Charles DePue* (Dena Corby; R. pp. 101-3), gave oral testimony only as to her recollection. She remembered that Miss Carrie Wing (now Mrs. Easterbrook) handed her a panful of peaches which had been peeled by the lye process. We have no doubt of this, and Mrs. DePue remembered that she had been instructed prior to that date *not* to refer to the peaches as lye peeled but as brush peeled, which is quite conclusive that this panful of fruit was not the first. She gave mere oral testimony of her recollection.

*Charles M. Funk* (R. pp. 105-7), bookkeeper of the Clark Engine & Boiler Company, testified as to recollection.

*William A. Geiger* (R. pp. 109-15), testified as to his recollection, and he had no opportunity to recollect anything earlier than the Fall of 1904.

*George E. Grier* (R. pp. 117-128), gave oral testimony as to matters fully presented by him in the main case, which has been considered and disposed of by Judge Van Fleet and this court. Grier has a lot of hearsay about W. R. Roach. Roach discreetly never put in an appearance to be cross examined.

*George Harrold* (R. pp. 130-1), gave oral testimony, nothing documentary, as to matters long past.

*Mrs. George Harrold* (R. pp. 133-5), says in substance the same as her husband.

*John Hetherington* (R. pp. 137-139), a mechanic, was at the Dunkley factory in 1904, and obviously had no knowledge of matters in 1903. A supplemental affidavit at (R. p. 142) relates to his 1904 recollection.

*William Hinterliter* (R. pp. 145-146), a resident of Los Angeles, not called as a witness at the trial there, testified to mere recollection.

*Mary Z. Hinterliter* (R. pp. 148-150), also a resident of Los Angeles, not called as a witness at the trial there, testifies as to mere recollection.

*John Hodgson* (R. pp. 152-3), with the American Can Company at Maywood, Illinois, did not testify in the main case, and has confessedly no knowledge of the year 1903.

*Maud Howes* (R. pp. 155-157) was bookkeeper for Clark Engine & Boiler Company, has no testimony except as to her recollection and the books are not shown to be pertinent.

*Jacob Hycoop* (R. pp. 159-161), testifies as to recollection and that he worked on a peeler in 1904, not in the least pertinent as to what occurred in 1903.

*Dorothy Janashak* (R. pp. 163-4), bookkeeper for the Kalamazoo Machine & Tool Company, identified books which have no relation to any work that had any particular bearing on the subject matter of this case.

*Leander Kern* (R. pp. 166-7), could have no recollection as he was not employed by Dunkley Company until 1907. He was in the factory at South Haven in 1910 and attempts to testify about records there, which can be of no consequence.

*Mrs. Leander Kern* (who was Verna Hallock), (R. pp. 170-3), a most voluble witness as to matters which occurred at South Haven in her absence. She having left South Haven for Kalamazoo about the middle of September, 1903, and testifying to matters at South Haven thereafter. Her testimony is not supported by documents and is hearsay.

*Mrs. Krugler* (R. pp. 175-6), gives mere oral testimony.



*Edwin Mapes* (R. pp. 178-180), gave oral testimony as to machinery. He produced some books of account which were considered in the main case by Judge Van Fleet.

*McEwing* (R. pp. 182-3), gave mere oral testimony showing that he could not have had any knowledge.

*Bert McFarland* (R. pp. 186-8), says he saw the small experimental brush machine in the Fall of 1903, and he asserts that it was not used commercially. He testifies about the long table, which is not material to the issue in hand.

*John C. Miller* (R. pp. 190-1), made the tin work for the long table in 1903. He obviously knows nothing about the peach peeling machine, as he had no opportunity to know.

*Eleanor Moore* (R. pp. 193-4), whose maiden name was Eleanor Wright and whose name does not appear on the pay rolls at the time she says she was with the Dunkley Company. Her testimony is to mere recollection.

*George Myhan* (R. pp. 196-7), one time postmaster of South Haven, testified orally as to mere recollection, unsupported by any document.

*Charles R. Newton* (R. pp. 200-1), testifies to mere recollection as to matters in 1903.

*Robert Newton* (R. pp. 203-5), gave oral testimony as to mere recollection. His testimony is wholly inconsis-



ent with the detailed testimony given in 1910 in the Dunkley-Beekhuis interference, where he testified to having seen the single line machine in use daily for several weeks in the summer and fall of 1903, and obviously he could not have mistaken it for the three line machine in use the next year. We think quite clearly his recollection at the earlier period, 1910, would have been superior to that given later on, when he was stimulated by agents of the defendants to recollect matters as they would like to have him recollect. He was afforded a pleasure trip to California and up and down the coast, which, of course, would result in a very kind feeling toward the defense. His story is highly improbable and not supported by any documents, and is contradictory to his earlier testimony.

*Arthur W. Norton* (R. pp. 206-212), gave his oral testimony without support of documentary proofs except that his recollection is wholly at variance with the documents he inspected. Clearly he could have been produced for cross examination in the New York case. There is nothing in his testimony which should be entitled to consideration now. His affidavit was sworn to on the 6th day of December, 1918. In his supplemental affidavit at (R. pp. 214-5) he says the machine of the first experimental model was made in the Fall of 1903. Maybe he regarded the use as a commercial experiment.

*John F. Noud* (R. pp. 217-8). We have no doubt he furnished the lumber for the long table in 1903, which has nothing to do with the merits of this case.

*Nicholas Plating* (R. pp. 220-22), testified that he worked on a soup tank, which we have no doubt he did,

but it has nothing to do with the case here in hand. His supplemental affidavit is at (R. pp. 224-5). He has no documentary proofs, he merely speaks from recollection, but we think his recollection is good and that he did make a soup tank.

*Lewis Payne* (R. pp. 227-8), made some patterns for the Dunkley Company at the order of Stewart Campbell in the spring of 1904. We have not the slightest doubt in the world that he did, but it shows nothing of any force in establishing matters in this case.

*Daniel P. Robinson* (R. pp. 229-32), speaks orally from recollection without the support of any documents and only testifies as to the spring or early summer of 1904 at the Dunkley factory in South Haven. He could have no recollection of matters pertinent to the issues in this case.

*William C. Spencer* (R. pp. 235-6), testifies as to occurrences during the peach season of 1904. Certainly this could not be pertinent as to happenings in 1903, and is oral testimony as to his mere recollection.

*Mary J. Stafford* (R. pp. 238-9), gave oral testimony as to her recollection, and she does not remember.

*Fred Stebler* (R. p. 242-3), is referred to by Judge Van Fleet as the one new witness relative to the Baker-Chalker machine who was not before him. He testified to his recollection of what he saw in about fifteen minutes at Fresno in the year 1902. He had no documents nor anything to support his testimony, and while he owns the Baker-Chalker patent, which if it was a

peach peeling machine would warrant his going into that business, he never had anything to do with the peach peeling business thereafter.

*Harrie E. Stewart* (R. pp. 246-7), one of the "investigators" of the defendants, could not possibly have any first hand knowledge to give any testimony about.

*William Triece* (R. pp. 249-250), gave oral testimony as to his recollection. We are quite sure that he did the wiring of the long table, he has books to show that. He remembers also that he saw the old machine, Exhibit No. 11, operated by hand in 1903. He remembers C. D. Crary there in 1903, as to which we believe he is mistaken because Crary testifies he was there in 1902, a very easy matter to mistake. But it is only recollection of events long past.

*Abe Vanderbrook* (R. pp. 254-6), gave oral testimony as to his recollection. On cross examination in the main case he remembered the test of the first machine in July, 1903, which confirms and supports Dunkley's testimony.

*Van Ostrand* (R. pp. 258-261), gave oral testimony as to his recollection of events long past. It will be noted that he signed by his mark, and we submit that it would be easy for an uneducated person to be mistaken as to documents and their substance. However, no documents are produced, he simply gives his recollection of events long past.

*Mrs. Frank Webb* (R. pp. 263-4), gave oral testimony

as to events long passed, unsupported by documentary proofs.

*Mrs. Nellie Weed* (R. pp. 266-7), gave oral testimony unsupported by any documents.

*William K. White* (R. pp. 269-278), counsel for defendants in the case, states his views about various matters in various ways. We cannot conceive that it can be of interest in the consideration of the facts, of which he had no knowledge.

We are very sure that this testimony is not of a character that should be considered, under the decision of the Supreme Court in the *Barbed Wire Patent*, and of this Court in *Diamond Patent Co. v. Starr*, and under the rule of *Symington v. National Malleable*, *supra*, to invalidate an issued patent.

There is a new document offered in this connection that is especially pertinent. In the motion and petition for leave to file as new matter, on page 26, attention is called to the long table, etc., in the testimony of Melville E. Dunkley. He says as to the long table of 1903:

“I don’t think I meant to infer that at all, but my mind was upon the machine which was—or the inspection table and the filling table which was there in 1904.”

Further down on the same page he is quoted as answering:

“Both parts of that table were cut in half in 1904, both the part with the conveyor belt in the middle and the slat filling part, was cut in two

with an idea of installing two lines with the peelers."

And he answers as to the 1903 season and table:

"I should say yes, sir. I don't remember that it was not; that is what it was put in there for. I don't know but what it was."

Then the testimony of S. J. Dunkley is referred to about this long table, and at (p. 29) the language of Judge Trippett is quoted for the special consideration of this Court at this time, where he said:

"The construction of this table, and the existence thereof, in the peach season of 1903, is utterly inconsistent with the theory of plaintiff's case."

This shows how completely he had been misled by the argument of defendants' counsel, because they now produce the documentary proofs sustaining the plaintiff's position to the contrary. The matter now produced is quoted at length at page 33 of the printed petition, where it says in April, 1904, considering the inside:

"Important changes are being made in the machinery which is under the direction of Stewart Campbell, who is the inventor of two new machines to be used for the first time this season, a pitting machine and a paring machine. *Two of each will be put in, as they are building an additional paring table 110 feet long.*"

We therefore have the document showing that these things were in progress and that not only is it not inconsistent with the presence of the Dunkley peeling machine to have a paring table present, but that one was

actually in process of construction 110 feet long in 1904, when there were two such paring machines to be installed.

This article was written in April, 1904. It shows what was in progress, and we submit that if the machine had not been tested out so that the Dunkley Company absolutely knew it was a commercial success, it would not have been warranted in reorganizing on this extensive basis. Prudent manufacturers do not do business that way.

This confirms plaintiff's position, that the machine had been commercially tested and used the year before, and it is supported by the Norton correspondence and Mr. S. J. Dunkley's testimony, which was refreshed by the documents, as to which documents there is not any question, because they were offered in evidence by defendants themselves. Judge Van Fleet says in his opinion, page 288 of Record 3824:

“Indeed, I regard the item referred to as the ‘Norton letters,’ to which much significance is attached, as making, in their sequence, when properly construed, entirely in favor of the plaintiff.”



Fifth—The merits of this whole matter support Dunkley's position, and particularly is Dunkley's patent supported by the documentary proofs offered herein.

Dunkley's proofs in support of his invention are elaborately considered in the brief for plaintiffs-appellants in this court in the case of *Dunkley Co. and Michigan Canning & Machinery Co. plaintiffs- appellants, v. Pasadena Canning Co. and George E. Grier, defendants-appellees, No. 3316*, beginning at page 51 of the brief to page 172.

There appears in that record not only that the patent has been duly issued but there is the undisputed testimony as to the development of the invention. The frame of the first machine is produced. The witnesses on behalf of Dunkley are:

*Abe Verhage* (R. p. 3992), who assisted in the construction and operation of the machine, beginning in 1902, and operating the same under commercial conditions in 1903. He identified the framework of the precise old machine.

*Mrs. Verhage*, his wife, testified to the same matter (R. p. 4017).

*John A. Wiers* (R. p. 4036), testified to the same matter.

*Mrs. Mace* (R. p. 4198), testified to much the same matter, and to correspondence relative to the samples of fruit put up in 1902, identifying correspondence with the chemical department of the University of Michigan.



These witnesses were all in support of the testimony of S. J. Dunkley, two testified in detail on the whole subject, and his son Melville E. Dunkley, who testified fully on the whole subject, and the testimony of Mrs. Carrie Wing-Easterbrook.

*Mrs. Easterbrook* was called by defendants in the Pasadena case and testified at great length (R. p. 320), being cross examined by defendants and giving the early history without any question, having a very clear recollection of it. She is the sister-in-law of Samuel J. Dunkley.

*C. D. Crary* (R. p. 295), a witness for defendants, remembered the old machine in December, 1902.

The frame of the old machine itself has been preserved and has been identified by all of these witnesses (except Crary) and by Harvey Schau, who testified in the instant cause as having seen the same in the fall of 1902. Mr. S. J. Dunkley refreshed his recollection particularly by the Norton correspondence, which is referred to particularly by Judge Van Fleet in his decision at page 279 of the record in this case, No. 3824.

This Norton correspondence is elaborately considered in the brief for plaintiffs in *Dunkley Co. v. Pasadena Canning Co.*, from pages 57 to 67, to which we refer for detailed consideration.

We mention here briefly and rapidly a letter from Edwin Norton to Dunkley, dated October 23, 1903, where the visit of Arthur Norton and Melville Dunkley is mentioned and where Norton says:

“Their description of the perfect working of the *peeling* and grading machines for peaches are very interesting.”

Mr. Dunkley replied October 29, 1903 (R. p. 4124):

“The South Haven factory is now closed up and we have been working this week on a peach pitter, and Mr. Campbell has already got out the working parts and I think we have it so that it will halve and pit the peaches nicely and quickly *from the peeler.*”

He then refers to “The Canner and Packer,” which is a means of absolutely fixing the date, and mentions that he would like to cover the machine with patents. On November 7, 1903, Dunkley wrote:

“We are busy working on a *new* paring machine and we have got up a pitting machine.”

On February 10, 1904 (R. p. 4128), Dunkley wrote:

“We have made our prices so as to get volume of business.”

He refers in the same letter to the machine being made by Campbell, saying:

“This we are sure will work as we worked the same thing last year and there is no question about it.”

and followed:

“We have the peach pitter nearly ready to assemble, and Mr. Campbell is very sure that this will work, though if it does not we have figured it will only cost us 3 cents per dozen to halve the peaches and pit them by other methods.”

There is a letter from Norton to Dunkley, dated March 8, 1904, saying:

“I know Mr. Campbell must have his hands full with ‘Annanias’ and the other machines.”

On March 9, 1904, Dunkley wrote Norton (R. p. 4103):

“Mr. Campbell has the peach pitter almost done.”

and adds:

“The prevaricator is set up and very nearly completed and is a nice machine.”

Dunkley says in a letter of March 28, 1904, to Norton:

“We must also bear in mind that we are now working under different conditions, as the labor-saving machines we are now putting in enables us to put our pack of goods on the market at popular prices.”

On April 7, 1904, he writes:

“The peach pitters are complete and will split an apple all right.”

On June 2, 1904, Dunkley wrote (R. p. 4149):

“I have just heard from Georgia that early peaches are now coming on and they expect to have free stones in about ten days, and then we can try our *pitting* machine.”

No need, of course, to try the peeling machine, because that had been operated the year before.

Plaintiff then shows correspondence with Courtney, as he had become discouraged about Campbell's pitting machine, and Norton wrote on June 8, 1904 (R. p. 4153):

“As the market here is full of early peaches I suppose you will soon be able to secure sufficient supply to make a real test of our ‘Annianias’ and the pitting machine.”

showing that the spray part of the machine was not a part needing consideration. On June 16, 1904, Dunkley wrote to Norton (R. p. 4155):

“We have not been able to make a test of the *pitting* machine as yet but expect to get peaches next week to do so.”

On August 5, 1904, Dunkley wrote to Norton (R. p. 4159):

“In regard to fitting over the cherry pitters to pit the soft peaches would say I have gotten something better in my Kalamazoo peach pitter, which will pit a soft peach in fine shape.”

He says:

“We have just received some peaches from Chicago today and are putting them through.”

On August 19, 1904, Dunkley wrote Norton (R. p. 4161), saying:

“The prevaricator (the special form of tank built for the lye peeling machine) has been tested and is all right *as well as* the rotarys, and Campbell has made new knives for his two pitters and expect they will work fine on firm fruit. I have completed the peach pitter and the kind here at South Haven ready to run automatically that will do from 80 to 100 bushels per day, ten hours, and will have five more delivered by September 1st.”

We are very clear that this sequence of correspondence entirely warranted Judge Van Fleet's statement that it made for the plaintiff's case and is certainly full documentary proof and abundantly supported by matter appearing on page 33 of the printed petition herein, where the "Improvements to the Canning Factory" are referred to in the Tribune-Messenger of April 22, 1904. It is there pointed out that "two new machines are to be used for the first time this season, a pitting machine and a paring machine. Two of each will be put in as they are building an additional *paring table 110 feet long*." For a full discussion of all details, we refer to our brief in the Pasadena case.

**Sixth—**The Dunkley patent has the prestige of an issued patent, and is adjudicated and supported by undisputed testimony of a large number of unimpeachable witnesses, whose testimony is confirmed and supported by all the pertinent documentary proofs in this case.

Dunkley has the prestige of an issued patent, and this has been held sufficient, as pointed out in many cases *supra*, to protect him against attack by mere oral testimony as to events long past.

The Dunkley patent, however, is not the usual patent granted on an *ex parte* proceeding. Dunkley encountered an interference in the Patent Office with one Beekhuis, which interference was hotly contested. It involved distinctly the question of priority and of invention. There was a complete showing therein as to the

prior art, and a complete statement by Beekhuis of what had gone before in the securing of his patent, which patent was afterward put into interference with Dunkley.

After a protracted contest and complete proofs, the Court of Appeals for the District of Columbia decided the controversy in favor of Dunkley, and they said as a result of their thorough and careful consideration:

“Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches.”

There has been no testimony offered since of a different character than that which was submitted in the interference, and thus considered by that court as supporting their finding.

The Beekhuis patent was owned by the California Fruit Cannery Association, who abandoned the Vernon device in favor of it. Both Beekhuis and Vernon were submitted in the trial of this case before Judge Van Fleet, and all matters were fully considered by him. An appeal was taken to this court and this court carefully reviewed the whole matter in an opinion rendered by Morrow, Circuit Judge, reported in 247 Federal 790. Considering the Beekhuis matter and the decision of the Court of Appeals of the District of Columbia, this court said:

“We see no reason for reversing this decision, after a careful reading of the testimony.”

Therefore the decision of the Court of Appeals for the District of Columbia, that



“Dunkley was the first to invent and put into practice a rapid and effective machine for peeling peaches”

has the approval of this court.

There were three other matters of anticipation particularly urged, as pointed out by Judge Van Fleet: The Vernon device, which, as stated above, was abandoned by the California Fruit Canners' Association for the Beekhuis; the Grier device which was not patented and as to which there was only oral testimony, the Grier device being held to be an infringement of Dunkley; and there was the testimony of Stewart Campbell, which was mere oral testimony of events long past, of which Judge Van Fleet stated:

“I could not extend the limits of my credulity sufficiently to put credence in the testimony of Campbell.”

These matters of anticipation were each definitely considered by this court, as pointed out in 247 Fed. Rep. at pages 792-3-4.

We have therefore three tribunals upholding the Dunkley patent. After this concurrence there have been two decisions by district judges to the contrary, both of which were reviewed by Court of Appeals which did not find it necessary, in disposing of the cases, to consider the questions of validity and scope of the patent:

First: The decision of this court in *Dunkley v. Pasadena Canning Co. and Grier*, reported at 261 Fed. 386, where Judge Rudkin stated at page 387:



“But in the view we take of the case it is only necessary for us to consider the question of infringement.”

The court said further:

“The Grier machine or device then before the court is not involved in the present case.”

quoting with approval the previous finding of this court that the Grier device then before the court was anticipated by Dunkley.

Second: The case by the Circuit Court of Appeals for the Second Circuit, which held that the defendant, California Packing Corporation, was licensed, reported at 277 Fed. 996. The court said at page 1001:

“We need not go further and consider the *validity* and *scope* of the Dunkley patents. On this point we express no opinion, \* \* \*.”

Judge Van Fleet has carefully considered the decisions of the district judges in these cases, and was constrained to insist that his original views were right and should not be influenced by matters which he finds presented to the other district courts. He points out in 277 Fed. Rep. at page 1002, that these matters were before him and both had been considered on appeal at that time, and he says at page 1005 (page 287 of the record herein, No. 3824):

“I have taken pains, with the aid of a very complete index memorandum furnished by counsel, not only to carefully review the evidence introduced before me but everything additional found in the records in both *Dunkley v. Pasadena Canning Co.* and *Dunkley v. California Packing*

*Corporation*, presented for the first time before Judge Trippett in the former case and later to Judge Hand in the latter; and in my consideration of the evidence I have had the benefit of the views and comments found in the opinions of both my learned brothers, which led them to an opposite conclusion with myself as to the validity of the patent, yet nevertheless, I am constrained to say, that with the highest consideration for the learning and ability of both, I am impressed with neither the character of the new evidence nor with the conclusions reached in those cases.”

He then comments:

“That there was a cloud of ‘new’ witnesses it is quite true, giving indication that the country had been raked with a fine-toothed comb, so to speak; but there was little new evidence given by them—if the term be used to express the idea of material evidence.”

He points out his conclusion, as already quoted, that the testimony is unsupported oral testimony, not proper to be considered in invalidating a patent, and particularly ought it not to be considered when a patent was obtained after a hotly contested interference, and has been upheld on substantially the same record repeatedly by courts of last resort.

Defendants cannot refer to any documentary proofs in support of their position. Plaintiff has already pointed out the extensive documentary proofs in support of its testimony, and it has the old machine itself, so that plaintiff’s testimony is supported by documents and a structure unquestionably the original machine manufactured.

The defendants have attacked the testimony of Melville Dunkley and of Samuel J. Dunkley at the present time, as unwarranted, and they produce now a final document, a newspaper article published in April, 1904, which supports the position of plaintiff completely. It shows that Melville Dunkley and S. J. Dunkley were right when they said that two lines of machines were contemplated in the spring of 1904. This newspaper article, quoted at page 33 of the printed petition, says:

“Two new machines to be used for the first time this season, a pitting machine and a paring machine. Two of each will be put in, as they are building an additional paring table 110 feet long.”

showing a long paring table being installed in the year 1904, precisely as stated by Melville Dunkley, who was attacked for making such a statement. Therefore the documents here submitted entirely support the testimony attacked, and show that Judge Trippett was misled into saying that the presence of a parng table in 1903 or at any time, was inconsistent with the presence of the Dunkley peeling machine. There was another such paring table being made when two Dunkley machines were to be installed.

There is not the slightest reason for considering any document for the reopening of this case or for permitting the defendants to file an original bill in the nature of a bill of review. There is nothing in the merits of the case presented by them. They certainly have not been diligent, for they have delayed three years, and it is no excuse to say that they applied to Judge Van Fleet and therefore should be given credit for that. Judge Van Fleet has passed on the merits adversely. If

it was any part of their duty to apply to this Court, it certainly was their duty all the time, and they have not complied with that.

But why should this Court now direct that the application be repeated to Judge Van Fleet. He has already considered the merits and found against defendants. And in any event the filing of an original bill in the nature of a bill of review is not a matter of right, and should only be permitted if a meritorious showing had been made, which has not been done by defendants; nor has there been any explanation of substantially three years delay.

The motion and petition, we respectfully submit, should be denied as untimely and wholly without merit.

Respectfully submitted,

Fred L. Chappell,  
W. A. Richardson,  
*Counsel for Appellees.*